

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 WALTER RAY REDMOND, No. C 07-04276 CW (PR)
4 Plaintiff, ORDER GRANTING DEFENDANTS' RENEWED
5 MOTION TO DISMISS FOR FAILURE TO
6 PROSECUTE AND TERMINATING ALL
7 PLAINTIFF'S PENDING MOTIONS AS MOOT
8 SAN FRANCISCO POLICE DEPT.,
9 et al.,
10 Defendants.

11 _____ /
12 INTRODUCTION
13 On August 20, 2007, Plaintiff Walter Ray Redmond filed this
14 civil rights action under 42 U.S.C. § 1983, alleging excessive
15 force arising from a July 15, 2007 interaction with four narcotics
16 officers from the San Francisco Police Department.

17 Before the Court is Defendants' renewed motion to dismiss for
18 failure to prosecute based on Plaintiff's repeated refusal to
19 attend and complete his deposition. Plaintiff opposed the motion
20 in a series of letters to the Court, and Defendants filed their
21 reply.

22 Having considered the papers filed by the parties, the Court
23 hereby GRANTS Defendants' renewed motion to dismiss for failure to
24 prosecute and TERMINATES all Plaintiff's pending motions as moot.

25 BACKGROUND

26 Plaintiff failed to appear at his deposition duly noticed for
27 June 17, 2009. (Lee Decl. ¶ 5.) Plaintiff appeared in response to
28 a second deposition notice for August 7, 2009, but at several

1 points refused to answer questions. (Redmond Dep. at 17:20-21,
2 28:15-19.) Forty-seven minutes after it began, Plaintiff
3 terminated his deposition, despite being warned by opposing counsel
4 that by refusing to complete his deposition he was risking
5 dismissal for failing to prosecute the case. (Redmond Dep. at
6 43:4-45:7; Margolis Decl. ¶ 2.)

7 On August 10, 2009, Defendants filed their first motion to
8 dismiss for failure to prosecute under Rules 37(d)(1)-(3) and 41(b)
9 of the Federal Rules of Civil Procedure. In an Order dated
10 September 29, 2009, the Court denied Defendants' motion to dismiss
11 and directed the parties to schedule another deposition session for
12 Plaintiff. (Sept. 29, 2009 Order at 5.) The Court explicitly
13 ordered Plaintiff to attend Defendants' properly noticed deposition
14 even if he was not represented by counsel. (Id.)

15 Thereafter, Plaintiff failed to appear on April 21, 2010 in
16 response to the third deposition notice. (Margolis Decl. ¶ 6.)

17 Finally, Plaintiff appeared on May 4, 2010 in response to the
18 fourth deposition notice, after demanding that his bus fare from
19 Las Vegas be at Defendants' expense. (Id. ¶ 8.) Plaintiff had
20 previously reassured Defendants' counsel that he "won't walk out
21 this time." (Id., Ex. F.) Plaintiff brought his brother, a non-
22 lawyer, who prompted him with some answers and disrupted the
23 deposition by taking Plaintiff out of the room. (Id. ¶ 8.)
24 Plaintiff also refused to answer certain questions unless he was
25 represented by counsel. (Redmond Dep. at 72:1-2, 118:2-11.)
26 Defendants' counsel warned Plaintiff that "the absence of counsel
27 does not excuse [him] from the obligation to prosecute this lawsuit
28

1 and to answer questions at a deposition." (Id. at 66:4-17.)
2 Defendants' counsel further stated that if Plaintiff continued to
3 refuse to answer questions, then he would seek "dismissal of this
4 action for failure to abide by the court's order." (Id. at 66:17-
5 20.) Plaintiff again prematurely terminated his deposition after
6 seventy-six minutes. (Id. at 118:2-120:6; Margolis Decl. ¶ 9.)

7 On May 6, 2010, Defendants filed their renewed motion to
8 dismiss for failure to prosecute under Rule 41(b), or in the
9 alternative, under Rule 37(b) and (d)(1)-(3). Defendants claim
10 that Plaintiff "has repeatedly failed to submit to his duly noticed
11 deposition, despite repeated orders by this Court requiring his
12 attendance." (Mot. to Dismiss at 1.) They contend that this
13 failure has deprived them of the opportunity to question Plaintiff
14 on relevant subjects, including details of the officers' actions;
15 what was said during the incident; evidence of municipal liability;
16 the extent and effects of Plaintiff's injuries; and Plaintiff's
17 employment, criminal and medical history.

18 In a letter to the Court dated May 13, 2010, Plaintiff opposes
19 Defendants' motion, stating, "I told my story twice and it was not
20 recorded at all!" (Pl.'s May 13, 2010 Letter at 3.) He claims
21 that the excerpts Defendants attached to their renewed motion to
22 dismiss do not accurately reflect the deposition as a whole, since
23 much of his relevant testimony was omitted. (Pl.'s May 15, 2010
24 Letter at 3.)

25 In an Order dated June 14, 2010, the Court directed Defendants
26 to provide it with complete copies of the transcripts of
27 Plaintiff's August 7, 2009 and May 4, 2010 depositions. (June 14,
28

1 2010 Order at 2.) The transcripts reveal that Plaintiff became
2 frustrated and terminated both of the deposition sessions that he
3 did attend, without giving Defendants an opportunity to obtain a
4 detailed description of the incident. It is clear that Plaintiff
5 did not terminate his deposition for good reason.

6 DISCUSSION

7 A district court may dismiss an action for failure to
8 prosecute pursuant to Federal Rule of Civil Procedure 41(b). See
9 Link v. Wabash R.R., 370 U.S. 626, 633 (1962); McKeever v. Block,
10 932 F.2d 795, 797 (9th Cir. 1991). "[F]ailure to prosecute
11 diligently is sufficient by itself to justify a dismissal."
12 Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976).
13 "But only unreasonable delay will support a dismissal for lack of
14 prosecution." Nealey v. Transportacion Maritima Mexicana, S. A.,
15 662 F.2d 1275, 1280 (9th Cir. 1980) (emphasis added).

16 A court should consider five factors before dismissing an
17 action under Rule 41(b): (1) the public interest in the expeditious
18 resolution of the litigation; (2) the court's need to manage its
19 docket; (3) the risk of prejudice to the defendants; (4) the
20 availability of less drastic sanctions; and (5) the public policy
21 favoring the disposition of actions on their merits. See Malone v.
22 U.S. Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987); Henderson v.
23 Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986).

24 A dismissal for failure to prosecute is generally with
25 prejudice and operates as an adjudication on the merits for
26 purposes of preclusion. See Fed. R. Civ. P. 41(b); In re
27 Schimmels, 127 F.3d 875, 884 (9th Cir. 1997); Johnson v. U.S. Dep't
28 of the Treasury, 939 F.2d 820, 825 (9th Cir. 1991). Dismissal with

1 prejudice of a complaint under Rule 41(b) is a harsh remedy, and
2 the district court should first consider less drastic alternatives.
3 See McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996). When
4 determining whether the sanction of dismissal is appropriate, the
5 "reasonable exploration of possible and meaningful alternatives is
6 all that is required." Anderson, 542 F.2d at 525; see also Von
7 Poppenheim v. Portland Boxing and Wrestling Commission,
8 442 F.2d 1047, 1054 (9th Cir. 1971). Further, because the
9 harshness of a dismissal with prejudice is directly proportionate
10 to the likelihood that a plaintiff would prevail if permitted to go
11 forward to trial, the district court should consider the strength
12 of a plaintiff's case if such information is available before
13 determining whether dismissal with prejudice is appropriate. See
14 McHenry, 84 F.3d at 1178-79.

15 A plaintiff must prosecute his case with "reasonable
16 diligence" to avoid dismissal. Anderson, 542 F.2d at 524. Here,
17 Plaintiff hindered the progress of his case towards a decision on
18 the merits by twice failing to respond to deposition notices.
19 Although he appeared in response to two other deposition notices,
20 he refused to answer certain questions by Defendants' counsel, and
21 he terminated both sessions prematurely. Plaintiff explains that
22 he did not want to answer certain questions without counsel;
23 however, the Court had explicitly ordered him to answer questions
24 even if he did not have counsel. Plaintiff also asserts that he
25 was "traumatized" by the officers' alleged excessive force and,
26 when questioned at the deposition about the incident, stated, "It's
27 getting me emotional. It's making me upset." (Pl.'s May 15, 2010
28 Letter at 2; Redmond Dep. at 119:15-16.) Plaintiff expresses

1 frustration that "the city attys [sic] are masters of linguistics
2 and are allowed to manipulate" him at his deposition. (Pl.'s May
3 13, 2010 Letter at 2.)

4 These justifications do not exempt Plaintiff from his
5 obligation to sit for a complete deposition. Defendants are
6 entitled to discover Plaintiff's version of the events in order
7 properly to evaluate the case, the possibility of a dispositive
8 motion and/or settlement, and their trial strategy. An examination
9 of the deposition transcripts shows that, contrary to Plaintiff's
10 claim, he did not tell his story twice. In fact, Plaintiff
11 terminated both sessions before he answered specific questions
12 relating to the July 15, 2007 incident. By repeatedly thwarting
13 Defendants' legitimate attempts at discovery, Plaintiff has caused
14 an unreasonable delay in adjudication of his claims that supports
15 dismissal for failure to prosecute. See Nealey, 662 F.2d at 1280.

16 Application of the above five factors to this case favors
17 dismissal. See Malone, 833 F.2d at 128, 130.

18 Public interest in the expeditious resolution of litigation
19 and the Court's need to manage its docket weigh heavily in favor of
20 dismissal. Plaintiff's complaint was filed August 20, 2007 but has
21 not progressed past discovery, mainly due to Plaintiff's failure to
22 sit for his deposition. The Court is attentive to the particular
23 needs of pro se plaintiffs, but need not endlessly accommodate a
24 litigant who refuses to obey its orders. See Ferdik v. Bonzelet,
25 963 F.2d 1258, 1261 (9th Cir. 1992) (court's interest in docket
26 control weighed in favor of dismissal of action where plaintiff
27 failed to comply with court's order to file an amended complaint).

28

1 Discovery, in particular, was designed to be managed by the
2 parties.

3 The risk of prejudice to Defendants is high, in that the
4 events alleged in this action occurred on July 15, 2007, nearly
5 three years ago. As Defendants point out, the longer the suit is
6 delayed, the more witnesses' memories will fade, and the more
7 difficult it will be to defend the case. (Mot. to Dismiss at 11.)
8 Defendants have also borne the cost of two noticed depositions
9 where Plaintiff never materialized, and two that were incomplete,
10 and they have incurred more costs by paying for his bus fare in
11 order for him to attend the most recent deposition session.
12 (Margolis Decl. ¶ 12.)

13 The public policy favoring disposition of cases on their
14 merits is the only factor that weighs against dismissal. A police
15 excessive force claim is a serious one that calls "into question
16 the manner by which the state exercises its monopoly on the
17 legitimate use of force. Thus, the public has an interest in
18 having this case decided on the merits." Dahl v. City of
19 Huntington Beach, 84 F.3d 363, 366 (9th Cir. 1996) (public had an
20 interest in having case decided on the merits where two arrestees
21 claimed that in separate incidents and after being restrained, they
22 were beaten by officers and repeatedly bitten by a police dog and
23 suffered injuries including deep dog bites on the thighs, groins,
24 arms, and legs requiring stitches, permanent shoulder damage and
25 severe bruising). Plaintiff alleges that he was, without cause or
26 warning, choked unconscious by officers using a "full nelson
27 sleeper-hold" and that his neck "continues to hurt to this day."
28 (Compl. at 3-4; Pl.'s May 15, 2010 Letter at 2.) But, according to

1 Plaintiff, he was only unconscious for a "few minutes" and the
2 officers took him to the hospital to get medical care for his
3 injuries. (Compl. at 2.) In addition, Plaintiff's pain is not
4 continuous, and he acknowledges that his medical records state that
5 he had "no neck pain" and "no urgent medical condition." (Mot. for
6 Review Thoroughly of Medical Records at 1.) Because Plaintiff
7 refused to describe the excessive force incident in detail during
8 his deposition, there is little on the record to indicate that he
9 is likely to succeed on the merits. While Plaintiff claims the
10 officers used excessive force against him, he suggests that the
11 officers believed they were preventing him from swallowing drugs.
12 Plaintiff denies swallowing drugs, and alleges the force was
13 malicious and sadistic. However, it appears that no other
14 witnesses have stepped forward to confirm Plaintiff's story because
15 the acquaintance he was speaking with when the incident occurred
16 has not been located by either party. Furthermore, Plaintiff was
17 on probation for dealing cocaine at the time of the incident, which
18 gives credence to the officers' alleged assumption that Plaintiff
19 was attempting to swallow drugs that could have caused him serious
20 harm. While no drugs were found, a reasonable officer in
21 Defendants' position could have believed that the force used on
22 Plaintiff was justified.

23 While excessive force is never to be condoned, the force
24 Plaintiff alleges in this case is not so egregious that the need to
25 adjudicate his case on its merits outweighs the other four factors
26 favoring dismissal. See Ferdik, 963 F.2d at 1262-63 (even if
27 ambiguity about prejudice to defendants and "public policy favoring
28 disposition on the merits both weighed against dismissal, they

1 would not outweigh the other three factors that strongly support
2 dismissal here").

3 The Court attempted to use less drastic sanctions by denying
4 Defendants' first motion to dismiss and ordering Plaintiff to sit
5 for his deposition. (Sept. 29, 2009 Order at 10.) After Plaintiff
6 failed to attend his third noticed deposition session and
7 prematurely terminated his fourth, the Court must now consider more
8 drastic sanctions. Monetary sanctions are inappropriate due to
9 Plaintiff's in forma pauperis status. Plaintiff proposes the Court
10 appoint counsel for him and then order another deposition. (Pl.'s
11 May 13, 2010 Letter at 2-3; Pl.'s May 15, 2010 Letter at 2-4.) The
12 Court has repeatedly informed Plaintiff that until it can assess
13 his claims' likelihood of success on the merits -- which it cannot
14 do if he hampers discovery -- it cannot find exceptional
15 circumstances entitling him to counsel. (Nov. 14, 2007 Order at 2;
16 Sept. 17, 2008 Order at 12.)

17 Plaintiff has already had four chances to cooperate in giving
18 his deposition. Giving him another chance would be unfair to
19 Defendants. Plaintiff has failed to comply with the Court's
20 previous order to cooperate at his deposition. After promising not
21 to walk out on the most recent deposition, Plaintiff demanded
22 Defendants pay for his bus fare, was non-responsive to questions
23 posed by Defendants' counsel, allowed his brother to disrupt the
24 deposition, and terminated it without describing the excessive
25 force incident in detail. It is unlikely that Plaintiff would act
26 differently if given another chance to be deposed.

27 "There is no warning requirement when dismissal follows a
28 noticed motion under Rule 41(b)." Morris v. Morgan Stanley & Co.,

1 942 F.2d 648, 652 (9th Cir. 1991) (citing Nealey, 662 F.2d at 1279-
2 81). Nevertheless, in addition to the four opportunities Plaintiff
3 was given to sit for a deposition, he was repeatedly warned
4 throughout the litigation of his obligations as a plaintiff. In
5 the Court's Order of Service, he was told of his responsibility to
6 prosecute the case and comply with the Court's orders. (July 17,
7 2008 Order at 11.) As Plaintiff prepared to leave the August 7,
8 2009 deposition prematurely, Defendants' counsel reminded him of
9 these obligations and the risk of dismissal, stating: "We will file
10 a motion to dismiss for your failure to prosecute the case.
11 Because you have a duty, as the plaintiff in this case, to sit for
12 deposition." (Redmond Dep. at 43:15-17.) Defendants' filing of
13 the first motion to dismiss served as an additional warning to
14 Plaintiff. The Court gave Plaintiff another chance by denying the
15 motion. It ordered him to sit for his deposition and answer
16 questions even though he did not have counsel. (Sept. 29, 2009
17 Order at 10.) It also explicitly reiterated that Plaintiff must
18 comply with the Court's order and prosecute his case. (Id. at 15-
19 16.) And finally, at the May 4, 2010 deposition, Defendants'
20 counsel warned Plaintiff once more that by refusing to sit for his
21 deposition and answer questions, he risked "dismissal of this
22 action for failure to abide by the Court's order." (Redmond Dep.
23 at 66:19-20.) Plaintiff was informed by the Court and Defendants'
24 counsel of his obligations as a litigant, but chose to ignore them.

25 The Court is well aware of its need to be particularly
26 sensitive to the challenges faced by pro se litigants unfamiliar
27 with the judicial process. See Balistreri v. Pacifica Police
28 Dept., 901 F.3d 696, 699 (9th Cir. 1990). However, the delay in

1 this case is not due to Plaintiff's inexperience with complex
2 procedures. Plaintiff ignored clear deposition notices and
3 violated explicit instructions and orders by the Court. He has
4 exceeded the latitude of the Court's patience by repeatedly and
5 willfully hindering efficient adjudication of his claims.

6 Accordingly, the Court GRANTS Defendants' renewed motion to
7 dismiss for failure to prosecute. Because the Court grants
8 Defendants' motion under Rule 41(b), their alternative motion to
9 dismiss under Rule 37 need not be addressed.

10 CONCLUSION

11 For the foregoing reasons,

12 1. The Court GRANTS Defendants' renewed motion to dismiss
13 for failure to prosecute (docket no. 213). The complaint is
14 DISMISSED with prejudice. See Fed. R. Civ. P. 41(b).

15 2. The Clerk of the Court shall enter judgment, terminate
16 all Plaintiff's pending motions as moot, and close the file.
17 Defendants may recover their costs from Plaintiff.

18 IT IS SO ORDERED.

19 DATED: 6/25/2010



20 CLAUDIA WILKEN
21 United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

WALTER RAY REDMOND,
Plaintiff,

Case Number: CV07-04276 CW

SAN FRANCISCO POLICE DEPT et al.,
Defendant.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on June 25, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
located in the Clerk's office.

15 Walter Ray Redmond
1250 Pierce St #1
16 San Francisco, CA 94115

17 | Dated: June 25, 2010

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk